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No. 549

In the Supreme Court of the United States

OCTOBER TERM, 1930

NASH-BREWER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

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No. 549

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MEMORANDUM FOR RESPONDENT

The respondent does not oppose the petition.

The petitioner and the respondent stipulated that the decision of the Board of Tax Appeals should be reviewed by the Circuit Court of Appeals for the Second Circuit. (R. 23.) That court held that it had not jurisdiction of the petition for review, under Section 1002(d) of the Revenue Act of 1926 (copied on p. 8 of petitioner's brief) on the ground that, as the petitioner was a corporation which filed its return in California (R. 20-21), the

only courts having jurisdiction were the Circuit Court of Appeals for the Ninth Circuit and the Court of Appeals of the District of Columbia. (R. 34.) The *per curiam* opinion followed the opinion of the same court in *Massachusetts Fire & Marine Insurance Co.* v. *Commissioner*, 42 F. (2d) 189, which was handed down at the same time.

Support for this decision is found in *Spring Canyon Coal Co.* v. *Commissioner*, 38 F. (2d) 764 (C. C. A. 8th). We believe that no other Circuit Court of Appeals has taken this view of the statute, although there have been similar situations in the other Circuit Courts of Appeals. We are aware of no case in which any other court has discussed the question. The Circuit Court of Appeals for the First Circuit took jurisdiction in a case in which the record presented a similar situation. *Simmons Co.* v. *Commissioner*, 33 F. (2d) 75. (This Court denied certiorari, 280 U. S. 563, but the question of jurisdiction was not suggested to this Court.)

In *Fowler* v. *Commissioner of Internal Revenue*, 42 F. (2d) 837 (C. C. A. 2d) a similar situation was presented. It appeared in the petition that the taxpayer was a resident of California. Final decree in that case was entered by the Circuit Court of Appeals for the Second Circuit after date of the entry of final decree in the instant case. Although the matter was subsequently called to the attention of the court, it declined to vacate its judgment. (That case is pending before this Court on petition

for a writ of certiorari as No. 580, but the Government did not assign as error the action of the court in taking jurisdiction of the petition.)

The question decided in the instant case is an important one which ought to be settled.

Respectfully submitted.

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